CORRESPONDENCE.

Editor, Virginia Law Register:

The Supreme Court of Appeals of Virginia on last Thursday handed down thirty opinions in one day, out of which number it reversed twenty-two cases. This is a very startling record and yet to one who has heretofore taken the pains to notice the number of cases reversed, it is not a surprise because an investigation of the reports and the cases since the last report shows almost as great a proportion of cases reversed. If we assume the Supreme Court is right, which we have to do, **nolens volens,** then there must be something wrong with the decisions and rulings of the trial judges. If the same proportion of error maintains in the cases which do not find their way to the Court of Appeals because the amount is too small, or the litigants too poor, then our courts would seem to be instead of courts of justice, courts of injustice.

It may be argued it is only the cases that the lawyers think are manifestly wrong that are taken to the Court of Appeals. If that be true, it shows that the lawyers conducting the cases are vastly better lawyers than the judge who sits on the bench. But, my observation has been that the courts are more particular in their rulings in a case that is likely to go to the Court of Appeals, and the manifestly wrong decisions and rulings are in the smaller cases that cannot possibly be reviewed by higher courts. It will not do, even out of court, to argue that the Supreme Court of Appeals is in error in these many cases, for outside of the fact that we have a Supreme Court that has had a long training in this work, the very fact that the matters are threshed out by briefs and arguments and five men pass upon the questions, eliminates the possibility that the lower court is not in most cases in error. Therefore, we must assume that the lower courts in these cases err oftener than they are right, and, consequently, the people of Virginia are up against the proposition of having better judges, or else having the courts below consider more carefully the cases that they pass upon. Unfortunately for the judges in this matter, they cannot, except in a very few instances, say that they are overworked. The legislature at its last session created all the new courts that were asked for and more than a great many people thought were necessary. The trouble then must lie with the judges, and my opinion is that it is due to two causes—the method of selecting judges, and the salary paid them. I believe the judges should be paid such salary as to get the very best men that are in the profession to sit in our trial courts; and I furthermore believe, as I did when a member of the Constitutional Convention, and for which I contended, that the **judges should be elected by the people.** Our system of electing judges by the legislature is bad for many reasons; we do not get the best men and it is made the means of bartering offices, and in a sense buying and

selling the office of judge; for a friend of an applicant for judgeship will buy a vote of a member of the legislature, and such it is, whether we like to use that term or not, by selling him a vote for another office, or by getting him to vote for some appropriation which perhaps does not and should not commend itself to his judgment upon its own merits.

The judges are elected by the people in Alabama, Arkansas, Colorado, California, Florida, Kentucky, Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska and Tennessee, and other states. The only southern states, I believe, in which the judges are elected as in Virginia, are Georgia and South Carolina. The courts standing highest in the Union are New York, Ohio, Massachusetts, Kentucky and Tennessee, and in all these states the judges are elected by the people, except in Massachusetts where they are appointed by the governor. It seems to me now, as it did then, it was a great pity that when the Constitution did away with the dual court system, which was forced upon it by the Underwood Constitution, that it did not also return to the method of electing judges which was in vogue in Virginia before the Underwood Constitution, between 1850 and the time of the adoption of that constitution. The argument that seemed to prevail was to keep the judiciary out of politics, whereas, in my opinion politics has more to do with the election of judges in the method in vogue now than it would have in any other way. I do not believe any office is too sacred to be voted for by the people, and I do not believe that anything has as purifying effect as the ventilation that comes from the publicity that a man must pass through with to obtain an office; and further than that, in a republican form of government I do not think it is right that the office should be so far removed from the people. There is no class of officers, in the state of Virginia, to day, who have as much arbitrary power as the Circuit Court judges; for instance, in addition to their ordinary judicial powers they have the appointment of electoral boards, the removal of all officers, and by the way, they can remove even constitutional officers without the right of trial by jury, in some instances, which in my opinion the legislature should remedy, and they also appoint the commissioners of revenue and many other officers that touch the people very closely. I do not hesitate to say that to appoint this officer in the method by which it is done in the legislature, is undemocratic, and is not calculated to get the best men and results. I think there are about thirty states in the Union who elect their judges, and for us to say our people are not capable of electing judges is to stultify ourselves. At the time of the adoption of the present constitution there may have been some question, because we could not know what the electorate might be, but certainly there is now no fear, for the electorate, if anything, is too restricted. I believe the constitution should be

amended so as to elect the judges by the people. Our system is antiquated; it is undemocratic; it is liable to abuse and is abused, and should be changed.

D. C. O'FLAHERTY.

Richmond, Va., June 15, 1907.

Note.—We think it proper to call the attention of readers of Mr. O'Flaherty's article to the fact that whilst the number of reversals of cases heard by the Court of Appeals may seem to be large, it is just to state the fact, as shown in the February Number of the **Law Register**, that in reality seventy-two per cent. of the cases which go up to the Court of Appeals are reaffirmed—in other words, a large number of writs of error and appeals are refused, which means an affirmation of the lower court. A careful estimate made last January of appeals, writs of error and the cases heard by the Court, shows that seventy-two per cent. of the cases are affirmed, taking the refusals of appeals and writs of error as affirmation.

Editors, L. R.

Alexandria, Va.
June 26, '07.

Editor "Virginia Law Register":

I was naturally deeply gratified to see my article about the "unwritten law" republished from "The Independent" in the "Virginia Law Register" for June. I notice, however, that the name of the writer was appended to the end of the article with the prefix "Hon.," thus conveying the impression that I signed my name in that fashion. I think it only just that your readers should know that I do not indulge in signatures of that character. In fact, there was no signature whatever to the article as it appeared in "The Independent," but the name of the author was placed at the beginning of the article with the somewhat antiquated prefix of "Hon." before it. It is hoped that the well-known modesty of members of the bar, especially of those who chance to be members of the legislature, will be convincing proof that the "Hon." was your doing and not mine.

Also, I think it should be explained that the spelling in the article as it appeared in the "Virginia Law Register" was the handiwork of the editors of "The Independent." My article, as sent to them, was done according to Webster and Worcester and was translated by them into the new forms. I was surprised to find that these abbreviations had been retained by you. However, I suppose I have the distinction of being the author of the first article with the simplified spelling to appear in the "Virginia Law Register," or indeed, in any Virginia publication. I have not yet learned the old system well enough to wish to tackle a new one. Much less would I willingly flaunt the new one in the faces of my brethern of the Bar of Virginia.

But since you were so generous as to pay me an undeserved compliment in your note, I am more than compensated for the unflattering insinuations for which you are responsible; viz., that I sign my name with an "Hon.," and that I do not know how to spell.

Gratefully yours,
LEWIS H. MACHEN.

"Brain Storms" in City of Norfolk.

Editor Virginia Law Register:

In the present state of momentary insanity and the brain storm, it may be interesting to you and the profession to know that the good people of this city are not subjected to any such excuses on the part of criminals, at least where there is not some previous disease of the mind of the criminal, the Corporation Court of the City of Norfolk (Judge Allan R. Hanckel presiding), having recently, of its own motion, refused the very instruction which was granted in Strothers' Case. The instruction was offered by the defense in the case of Commonwealth *v.* Shadbolt, a murder trial; the Commonwealth made no positive objection to the instruction, but the Corporation Court would not grant it. The language of this instruction, substantially the same in both Strothers' Case and Shadbolt's Case, is as follows:

"If the jury believe from the evidence that stress or strain upon the mind of the defendant at the time of the commission of the homicide, arising out of the conduct and insulting language of Milton Brown, the deceased, and all of the other facts and circumstances of the case, so operated upon the mind of the defendant as that his reason was dethroned and his mind so impaired as that he became temporarily insane, as defined in these instructions, and that he was thereby rendered incapable of governing himself in reference to said Milton Brown, the jury should find a verdict of acquittal."

The instruction above copied is in the exact words refused in Shadbolt's Case; and the only differences between it and the language used in Strothers' Case, are; that in Strothers' Case the word "defendants" was used, the name of the deceased was different, and the words "and insulting language" were omitted in Strothers' Case.

Is not the condition of the mind mentioned in the instruction what our forefathers called "heat of blood," and what they regarded as simply in mitigation, and as a proper argument to be used in a petition for pardon from the King or Governor?

Very truly yours,
JAS. G. MARTIN.